No. 82-2088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,

v.

KAY BURNS, *et al.*,
Respondents.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,

v.

EUGENE J. GOSS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

GERALD P. NORTON
Counsel of Record
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8103

WERNER WEINSTOCK
JOHN P. MANGAN
1285 Avenue of the Americas
New York, New York 10019

FRED A. FREUND
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

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REPLY BRIEF FOR PETITIONER

Plaintiffs-respondents' opposition ("Opp.") confirms our main contentions as to why this Court should grant certiorari.

1. Plaintiffs do not dispute that the lower court's interpretation of the Age Discrimination in Employment Act ("ADEA"), giving coequal status to private and government enforcement actions, is in conflict with the interpretations of other courts of appeals and district

courts. Those courts have uniformly held that government actions have priority and private actions are subordinate, and have read the termination provision of Section 7(c)(1) of the ADEA to require termination of pending private actions by employees whose rights the government sues to enforce. Plaintiffs attempt to minimize this conflict by noting that some of the contrary decisions involved the application of that premise to provisions of the ADEA other than the termination provision (Opp. 12-15), but the effort fails.[1] The courts have properly examined the entire statutory scheme of the ADEA

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[1] Plaintiffs assert that three of the contrary authorities, which held that damages for "pain and suffering" or punitive damages were not available in private actions under the ADEA, have "[no] bearing on the issue presented in this case" concerning the relationship between private actions and government enforcement of the ADEA (Opp. 14-15). However, the rationale of those decisions was that the availability in a private action of such damages beyond back pay, which could not be recovered through government enforcement of the ADEA, would "jeopardize" or severely "cripple" the conciliation process by introducing a "volatile" and "uncertain" element that was likely to lead charging parties to sue rather than to accept a settlement generated through conciliation, thereby "substantially increas[ing] the volume of litigation in the trial courts, a development Congress did not desire." *Rogers v. Exxon Res. & Eng'g Co.*, 550 F.2d 834, 841 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1038-39 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Slatin v. Stanford Res. Inst.*, 590 F.2d 1292, 1294-96 (9th Cir. 1979). That rationale for subordinating remedies available through private actions to government enforcement applies directly to the incentive created by the decision below for one or more employees to give short shrift to the important conciliation process and to sue, perhaps prematurely, in the hope of gaining more than they think they might through the government's conciliation or litigation efforts. Such a course could frustrate or even doom those efforts if the government lacked the authority to terminate such private actions by commencing its own action, and would be contrary to the purpose of Section 7(c)(1) to facilitate government enforcement through conciliation and litigation and to permit the government "to discharge [its] responsibilities to achieve to the optimum the purposes of the Act." E.g., H.R. Rep. No. 805, 90th Cong., 1st Sess. 5-6 (1967).

in addressing questions concerning the proper interpretation of particular provisions of the ADEA, and the reasons favoring priority of government actions under other provisions noted by those courts apply as well to the present issue under Section 7(c)(1).[2]

2. The fact that other circuit and district courts have read the plain language of Section 7(c)(1) in accord with petitioner's position also militates against plaintiffs' contention that its terms had such a "settled meaning that the Court should assume that Congress intended "bring" to mean "commence" when both are used in the same clause in Section 7(c)(1), i.e., to file a complaint.[3]

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[2] Plaintiffs state that in only a limited number of reported decisions has the question presented been expressly or impliedly decided (Opp. 25 n.27). However, it is only in the last several years that there has been a substantial volume of private and government ADEA actions. Moreover, as EEOC noted in the court of appeals, there have been other recent unreported cases involving overlapping subsequent private and government actions, where the question was apparently not raised, and the adverse impact of the decision below is not limited to such overlapping actions but includes situations where a pending private action has the effect of thwarting conciliation, and discouraging the government from suing. We note in this connection that the statistics proffered by plaintiffs (Opp. App. A) may be misleading because they compare the number of ADEA *charges* filed by individuals with the number of ADEA *actions* filed by EEOC, without reference to the number of individuals whose rights EEOC seeks to enforce in each such action. For example, the 89 actions filed in fiscal 1981 alone included the EEOC's action against petitioner, which embraces more than 125 charging parties, and more than half of the other EEOC actions also were "class type" cases. *See* Daily Labor Report No. 193, Oct. 6, 1981, at E-1 (ADEA suits filed by EEOC in fiscal 1981).

[3] In *Goldenberg v. Murphy*, 108 U.S. 162 (1883), on which plaintiffs rely (Opp. 17), this Court held only that an action was "brought" for purposes of a statute of limitations when it was commenced by delivery of the complaint to the sheriff; the Court's statement about interchangeability of the two terms (which did not both appear in the statute in question, as here) was directed only to "this connection," i.e., "the subject of limitations." In other cases and contexts, however, "bring" has been held to mean more than

3. Plaintiffs' discussion of the court of appeals' reliance upon the relationship *vel non* between the termination provisions of Section 16(b) of the Fair Labor Standards Act and Section 7(c)(1) of the ADEA also confirms that there are serious questions concerning the correctness of the court's decision. Thus, plaintiffs contend that the language of the provisions is "virtually identical" and "both cut offs are part of ADEA enforcement procedure" (Opp. 18). However, plaintiffs have offered no meaningful rationale for Congress to expressly enact such a provision in the ADEA if it were identical to the FLSA provision which otherwise would be incorporated by reference.

Moreover, the court of appeals' decision and plaintiffs' position are at odds with the language of Section 7(b), providing that the ADEA is to be enforced in accordance with specified sections of the FLSA "and subsection (c) of this section" (29 U.S.C. § 626(b)), and also fly in the face of this Court's observation in *Lorillard v. Pons*, 434 U.S. 575, 582 (1978), that the express inclusion of a provision in the ADEA reflects Congress' intent to vary from the otherwise incorporated FLSA provisions. The

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merely to "commence" an action by filing a complaint. *E.g., Foster-Milburn Co. v. Knight*, 181 F.2d 949, 951-52 (2d Cir. 1950) (L. Hand, J.); cf. Connolly & Connolly, *A Practical Guide to Equal Employment Opportunity* 223-24 (1979) (using "bring" as including, but not limited to, "commencing" an action). Indeed, in *Mistretta v. Sandia Corp.*, 12 FEP Cases 1225 (D.N.M. 1975), 15 FEP Cases 1690 (D.N.M. 1977), *aff'd in part and rev'd in part on other grounds*, 639 F.2d 588 (10th Cir. 1980), 649 F.2d 1383 (10th Cir. 1981), as plaintiffs acknowledge (Opp. 12, n.9), the court held that the government's action terminated the right of employees it covered to bring an action by "opting-in" to or "entering" a pending private action (15 FEP Cases at 1693; Opp. 12 & n.9), thus reading Section 7(c)(1) as terminating more than the right to "file a complaint." The question whether commencement of the government's action terminated the pending private actions was not raised in that case, as the government apparently did not sue to enforce the rights of those who were already plaintiffs in private actions. *See* 639 F.2d at 590.

ADEA's inclusion of requirements of notice to and conciliation by the government—not found in the FLSA—provides ample reason for a separate termination provision in the ADEA which, to facilitate conciliation, would terminate a pending private action if the government sues to enforce the plaintiff's rights.[4]

4. Plaintiffs' responses to the adverse impact of the decision below, and the uncertainty resulting from the conflict among the circuits it creates concerning the government's authority to enforce the ADEA, fail to address the central problems. That decision leaves both the government's attorneys and a private plaintiff's attorneys seeking to enforce the same rights of the same individual. Such overlapping, duplicative actions might exist in widely scattered actions filed in federal or state courts, with no court having the power to eliminate the resulting difficulties.

Perhaps most significantly, even if the overlapping private and government actions were pending before the same judge, the court would not be able to order the government and the private plaintiff to agree on such matters as basic strategies and theories, relief sought, or the acceptability of a settlement proposal covering employees whose rights were being litigated in both actions. If the government cannot bind the private plaintiff, its enforce-

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[4] In addition, these differences between the FLSA and the ADEA weigh against the court of appeals' holding that in enacting Section 7(c)(1) in 1967 Congress should be presumed to have agreed with the interpretation of Section 16 of the FLSA reflected in the legislative history of one of many prior amendments to Section 16 (see Pet. 9-10 n.9). Plaintiffs err in suggesting that such a presumption is supported by *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), and *Lehman v. Nakshian*, 453 U.S. 156 (1981) (Opp. 20-21 & n.22). Neither case states any such presumption nor even involved the type of selective, partial incorporation by reference reflected in Section 7 of the ADEA. Indeed, the Court described the provision of the ADEA involved in *Nakshian* as "a distinct statutory scheme applicable only to the federal sector." *Id.* at 166.

CONCLUSION

For the reasons stated in the petition and in this reply brief, the Court should grant certiorari.

Respectfully submitted,

GERALD P. NORTON
Counsel of Record
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8103

WERNER WEINSTOCK
JOHN P. MANGAN
1285 Avenue of the Americas
New York, New York 10019

FRED A. FREUND
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Attorneys for Petitioner

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court of appeals did not so limit its holding; and plaintiffs have cited no language of the ADEA or its history that would support such a contorted reading of Section 7(c)(1). In short, plaintiffs cannot deny that the court of appeals' ruling permits a private action to survive if commenced even only a day before the government sued to enforce that plaintiff's rights, seeking identical relief, while Section 7(c)(1) would concededly terminate the plaintiff's right to bring an action (whether by filing a complaint or opting-in) at any time after the government action, even if the government did not seek the same relief.

6. Plaintiffs assert that the majority view reading of Section 7(c)(1) would discourage private attorneys from taking ADEA cases or lead them to "delay filing until the last minute" (Opp. 24). However, in this very action plaintiffs were able to retain four law firms despite the strong possibility suggested by the prior case law that a private action would be terminated if the government sued to enforce their rights (see Pet. 13-14). Moreover, rather than delay filing, many plaintiffs sued before the required 60-day waiting period had run (see p. 6, n.6, *supra*).[7] In sum, the stated concerns about the effect of the majority view reading of Section 7(c)(1) rest upon unfounded speculation.

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[7] In any event, if, unlike these actions, the private action is far advanced when the government sues, it can omit the private plaintiff from those whose rights the government action seeks to enforce, as the government has done on occasion. Under the decision below, however, the government is effectively denied the authority to define the group whose rights it will sue to enforce because it will be unable to litigate with exclusive control with respect to those who become plaintiffs in private actions at any time before the government commences its action.

ment authority would then be hostage to the plaintiff's wishes, in contrast to the government's "exclusive control of federal suits" under the ADEA intended by Congress. *Dunlop v. Pan Am World Airways, Inc.*, 672 F.2d 1044, 1053 (2d Cir. 1982).[5]

5. In an effort to narrow the impact of the ruling, plaintiffs suggest that the court of appeals' holding that a private action can be brought to a conclusion after the government sues to enforce the employee's rights applies only under two conditions: (1) the government action "does not demand all of the same relief as the earlier [private] action" (Opp. i, 6 n.6, 16 n.14); and (2) the aggrieved persons had become plaintiffs in the private action only "after giving the EEOC the statutory notice and waiting the requisite 60-day period * * *" (Opp. 15). However, neither condition in fact obtains here;[6] the

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[5] Since the statute confers a jury trial right only in a private action (29 U.S.C. § 626(c)(2)), it is also possible that, even if tried together, the identical claim as to the same individual would be decided differently by the court in the government action and the jury in the private action. Plaintiffs have made no response concerning the serious res judicata problems raised by the decision below (see Pet. 19 n.20), and evidently believe that a plaintiff in a private action would not be bound by a decision for the employer in the government's action, and would be free to relitigate the identical questions in the private action.

[6] The government action still seeks liquidated damages for the plaintiff in *Goss* even after the purported stipulation amending EEOC's complaint (Pet. 5 n.2, 7 n.6). Moreover, the complaint in *Burns* alleged only that some of the plaintiffs had given the government the required notice more than 60 days before the date when the complaint and the vast majority of the opt-in consents were filed; in fact, for most of these plaintiffs the 60-day period had not run and for some no notice was ever given. Plaintiffs note that in *Jones v. City of Janesville*, 488 F. Supp. 795 (W.D. Wis. 1980), the private action held to be terminated by commencement of the government action had been commenced only two days before the government action (Opp. 12), but neither the language nor the history of Section 7(c)(1) supports any such case-by-case application depending upon the margin by which the private plaintiff wins the race to the courthouse.